2015 IL App (3d) 140592

Opinion filed December 10, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

In re MARRIAGE OF TAMMY SCHLEI, Petitioner-Appellant, and MARK SCHLEI, Respondent-Appellee.	)))))))))))	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois. Appeal No. 3-14-0592 Circuit No. 13-D-560 Honorable David Garcia, Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court, with opinion.
Justice Lytton concurred in the judgment and opinion.
Justice Holdridge concurred in part and dissented in part, with opinion.

OPINION

¶ 1 The petitioner wife, Tammy Schlei, appeals from a trial court judgment making modifications to the child support obligations of respondent husband, Mark Schlei.

¶ 2 FACTS

¶ 3 The parties divorced in Michigan in 2007. The Consent Judgment of Divorce awarded the parties joint legal custody of their three minor children and designated the wife as the minors' primary residential custodian. The husband was ordered to pay child support in accordance with

Michigan law, and a schedule was attached to the judgment. The husband was ordered to provide health and dental insurance for the children and to pay for any uninsured costs. He was ordered to pay for the children's college education. He was also ordered to pay spousal support to the wife for 10 years, because the wife was a homemaker and unemployed at the time of the divorce.

¶ 4 On January 6, 2010, an order was entered by a Michigan court, reducing the husband's child support obligation from the scheduled amount of $3,906 to $2,598 per month. By that time, the wife and the children had moved to Colorado, and the wife had obtained a job, earning a gross monthly income of $7,708. The order also provided that the uninsured healthcare costs were to be divided, with the wife responsible for 32% of those costs. The husband was also required to pay to the wife 12% of the gross of all bonuses under $50,000 and 12.77% of all bonuses over $50,000.

¶ 5 In November 2011, the husband changed jobs and accepted a position with a company in Philadelphia. However, he was terminated from that position on February 6, 2012. On February 10, 2012, the husband filed a motion in the Michigan court to terminate his child support obligation due to his job loss. The wife contested the motion. The Michigan court entered an order on April 11, 2012, denying the father's motion to terminate child support and referring the parties for a referee hearing. That order specified that all modifications to child support would be retroactive to February 10, 2012. The Michigan court ordered the father to pay child support (for the two remaining minor children) in the amount of $1,572 per month. The court specified that it was an interim amount, retroactive to February 10, 2012. The Michigan court also required to wife to provide health care coverage for the minor children, including uninsured costs incurred since February 10, 2012.

¶ 6 The wife filed a motion to rescind the Michigan April 11 order and to enforce child support payments past due, claiming that the Michigan court lacked jurisdiction. On October 14, 2012, after a referee hearing, the Michigan court entered an order denying the wife's motion to rescind and directing that all further proceedings regarding child support take place in Colorado. The Michigan court found that, at the time the order was signed, it had jurisdiction over child support.

¶ 7 In November 2012, the husband secured new employment in Illinois. On January 24, 2013, the wife filed a motion to modify child support in Colorado. The case was dismissed by the Colorado court on the basis of *forum non conviens*, so the issue of child support proceeded in Illinois on the wife's petition to enroll the Michigan judgment in Illinois and modify child support. The case proceeded to trial on the husband's petition to terminate child support (filed in Michigan on February 10, 2012) and the wife's petition to modify child support (filed in Illinois on March 28, 2013). There were other pleadings, but they are not relevant to this appeal.

¶ 8 The husband testified that his annual base salary at his current job, since November 2012, was $278,100. He was also eligible to participate in short term incentive plan (STIP), a performance-based bonus that was not guaranteed. The husband was also eligible to participate in the company's long term compensation plan (LTIP), subject to a vesting schedule and performance criteria, and was granted 15,000 shares of restricted stock on his first day of employment. He was granted an additional 10,418 shares on September 5, 2013. On September 13, 2013, the husband received a bonus through the STIP plan of $72,261.18. The husband did not pay 12.77% of that bonus to the wife.

¶ 9 After considering all of the evidence, the trial court deviated from the child support guidelines and set child support at 15% ($2,483), a downward deviation from the usual 28%, of

the husband's net income, commencing on January 21, 2014. The trial court stated that it granted the deviation after consideration of the financial needs of the children, the financial resources of both parties, and the standard of living that the children enjoyed while living in Michigan. The wife's request for retroactive modification of child support was denied. The trial court also ordered the husband to pay 15% of the gross of any bonus he received after January 21, 2014. Any income that the husband received from his long term stock compensation was excluded as income for purposes of child support except the value of any shares that the husband sold and converted to cash, other than to pay income taxes. The wife was ordered to continue to provide health insurance for the children, but commencing on January 21, 2014, the husband and the wife would each be responsible for 50% of the uncovered costs. Finally, the trial court found that the husband had some bonuses that the husband owed 12.77% to the wife.

¶ 10 The parties filed cross-motions to reconsider. The wife's was denied. The husband's was granted in part and the healthcare provision was modified to provide that the wife would be responsible for 100% of the children's healthcare costs and the bonus payment was modified. The wife appealed. While the case was pending in this court, a motion to supplement the facts indicated that the husband was no longer employed with the same company as of September 1, 2014. As a result, some of restricted stock units that the husband held under the LTIP had vested and the rest were forfeited.

¶ 11 ANALYSIS

¶ 12 The wife argues that the trial court erred as a matter of law in denying her request for retroactive modification of child support and contribution to the children's uncovered healthcare costs. Alternatively, she argues that it was an abuse of discretion due to the delay in the proceedings caused by the husband and/or the judicial process. The husband argues that the first

issue is waived and that the trial court did not abuse its discretion. A trial court's decision regarding the retroactivity of child support is usually reviewed for an abuse of discretion. *In re Marriage of Streur*, 2011 IL App (1st) 082326, ¶ 13, *as modified on denial of reh'g* (June 15, 2011). However, when the issue presented is one of law, and the facts and the credibility of witnesses are not an issue, our review is *de novo*. *Id.*

¶ 13 The wife contends that the April 11, 2012, Michigan court order was clear and unequivocal that all modifications of child support were to be retroactive to February 10, 2012. Thus, she argues that it should have been enforced under the Uniform Interstate Family Support Act (Act) (750 ILCS 22/101 *et seq.* (West 2012)). Section 603(c) provides:

> "Except as otherwise provided in this article, a tribunal of this State shall recognize and enforce, but may not modify, a registered order if the issuing tribunal had jurisdiction." 750 ILCS 22/603(c) (West 2012).

¶ 14 Specifically, the April 11, 2012, order, with respect to child support and healthcare coverage, provided:

> "1. The parties are referred to the Friend of the Court for a Referee Hearing under MCR 3.215. All modifications of child support are retroactive to February 10, 2012
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> * * *
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> 3. Father shall pay child support at the rate of $1,572 per month for two minor children. This is an interim amount, retroactive to February 10, 2012.
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> ***
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> 4. *** Given Father's unemployed status and his reported cost of COBRA of $1,420.00 per month, Mother is responsible for health care coverage for the minor children, retroactive to February 10, 2012. Any uninsured medical costs incurred since

February 10, 2012, are the responsibility of Mother, pending final order of the referee hearing***."

¶ 15 The husband argues that the wife waived the issue of modification because she did not raise the issue of the Act in the trial court. While the wife did not cite to that Act specifically, she did argue for retroactive modification in accordance with the Michigan order. Thus, we reach the issue, and we find that the child support order should be retroactive to February 10, 2012. The Michigan court order of April 11, 2012, stated that all decisions would be retroactive to February 10, 2012. The Michigan court had jurisdiction when that order was entered, and the order was registered. Under section 603(c) of the Act, the circuit court was to enforce, but not modify, the Michigan order. Thus, the order requiring the husband to pay child support in the amount of $2,483 per month is retroactive to February 10, 2012.

¶ 16 The trial court found that any income that the husband received from his long-term stock compensation would be excluded as income for child support purposes except for the shares he sold and converted to cash. The wife contends that this was in error, arguing that the restricted stock should be included as income under section 505(a)(3) of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) (750 ILCS 5/505(a)(3) (West 2012)) as soon as they vested.

¶ 17 Section 505(a)(3) of the Dissolution Act sets out the formula for calculating child support and defines net income as the total of all income from all sources, less some deductions. *Id.* The trial court found that the shares that the husband received as long term stock compensation were not income unless he sold them and converted them to cash. Since "income" is not defined in the statute, we should give it its plain and ordinary meaning. *In re Marriage of McGrath*, 2012 IL 112792, ¶ 14. Illinois courts have defined income as a gain or a profit, or an increment or an

addition. See *In re Marriage of Anderson*, 405 Ill. App. 3d 1129, 1134 (2010). Thus, Illinois courts have determined that withdrawals from self-funded IRAs, proceeds from a reverse stock split, and speculative income do not constitute income under section 505(a)(3). *In re Marriage of O'Daniel*, 382 Ill. App. 3d 845 (2008) (withdrawal from self-funded IRA was not income because there was no gain when the money was already the husbands); *Anderson*, 405 Ill. App. 3d at 1134 (involuntary reverse stock split that resulted in a capital loss); *In re Marriage of Shores*, 2014 IL App (2d) 130151 (bonus that was at the discretion of the employer was speculative and was not income until it was actually granted).

¶ 18 The wife cites to *In re Marriage of Winne*, a case where it was held to be an abuse of discretion to exclude from income for child support purposes the full amount of the husband's *pro forma* account. *In re Marriage of Winne*, 239 Ill. App. 3d 273, 285 (1992). The *Winne* court held that while what must remain in an allocation account as a buffer for capital drawdown was not income, there was no statutory authority to exclude the whole account. *Id.*

¶ 19 Similarly, the entire amount of the husband's long-term stock compensation should not have been excluded as income. Since the husband is no longer employed with the same company, all of his restricted stock units have either vested or been forfeited. The restricted stock units that have vested are to be considered as income for child support purposes.

¶ 20 The wife argues that the trial court erred as a matter of law in granting the husband's motion to reconsider and allocating 100% of the responsibility for the children's uncovered healthcare expenses to the wife. The wife argues that the husband failed to present any new evidence with the motion to reconsider, and the trial court made no findings, that would warrant a modification of the prior order that the parties split the uncovered healthcare costs. The husband argues that his motion was brought solely on the basis that the trial court misapplied the

law in making the parties equally responsible for the children's uncovered healthcare costs when the wife had more monthly disposable income.

¶ 21 The purpose of a motion to reconsider is to bring to the trial court's attention newly discovered evidence, changes in the law, or errors in the previous application of the law. *Nissan Motor Acceptance Corp. v. Abbas Holdings I, Inc.*, 2012 IL App (1st) 111296, ¶ 16. Generally, a trial court's decision to grant or deny a motion to reconsider is reviewed for an abuse of discretion. *Id.* However, where the motion was based only on the trial court's alleged misapplication of the law, review is *de novo*. *Id.*

¶ 22 Section 505(a)(2.5) of the Dissolution Act provides that the trial court, in its discretion in setting child support, may order either or both parents to pay the children's uncovered healthcare expenses. 750 ILCS 5/505(a)(2.5) (West 2012). In his motion, the husband argued that the trial court erred in its child support calculation, including splitting the healthcare expenses, because it would result in a windfall to the wife.

¶ 23 The husband cites to the case of *In re Marriage of Raad*, 301 Ill. App. 3d 683 (1998), for the proposition that it was in the trial court's discretion to order the parent with more financial resources to pay the children's medical expenses. That proposition is not in dispute, but the parties argue over who had more financial resources. Based on the financial affidavits in the record, the husband earns three times more than the wife, but he is also still paying her spousal support. Considering the ordered child support, both parties have income that roughly equals their expenses. It appears that the wife's change of circumstances since the divorce was the basis for the healthcare order. In light of the child support and spousal support, it would have been fair to equally split the healthcare costs, but the trial court's finding that it would be a windfall to the

wife to increase child support and make the husband pay 50% of the uncovered healthcare costs was not an abuse of discretion.

¶ 24 CONCLUSION

¶ 25 In conclusion, we reverse the trial court's order to the extent that it denied the wife's request for retroactive modification of child support. The husband's child support obligation as ordered by the trial court ($2,483 per month) is retroactive to February 10, 2012. We affirm that part of the trial court order that made the wife responsible for 100% of the healthcare costs. As for the long term stock compensation, we reverse the trial court's order to the extent that it did not deem the vested units to be considered as income for child support purposes. Now that the husband has left that employment, the remaining vested units of long term stock shall be considered income for child support.

¶ 26 The judgment of the circuit court of Will County is affirmed in part and reversed in part.

¶ 27 Affirmed in part; reversed in part.

¶ 28 JUSTICE HOLDRIDGE, concurring in part and dissenting in part.

¶ 29 I agree with the majority that the trial court properly assigned 100% of the children's healthcare costs to the wife but erred in denying the wife's request for retroactive modification of child support. I therefore join those portions of the majority's judgment. However, I disagree with the majority's conclusion that the husband's vested restricted stock units (RSUs) should be treated as "income" for child support purposes under the IMDMA. I would affirm the trial court's ruling that the husband's RSUs should be excluded from his income for child support purposes unless and until they are sold and converted to cash.

¶ 30 Section 505(a)(3) of the IMDMA defines net income for child support purposes as the total of all "income" from all sources, minus certain specifically enumerated exclusions that are

not at issue in this case. 750 ILCS 5/505(a)(3) (West 2012). Although the Act does not define "income," our supreme court has construed the plain and ordinary meaning of that term to mean " 'something that comes in as an increment or addition ***: a gain or recurrent benefit that is usu[ually] measured in money.' " *In re Marriage of Rogers*, 213 Ill. 2d 129, 136-37 (2004) (quoting Webster's Third New International Dictionary 1143 (1986)). The supreme court also defined "income" as " '[t]he money or other form of payment that one receives, usu[ually] periodically, from employment, business, investments, royalties, gifts and the like.' " *Id.* at 137 (quoting Black's Law Dictionary 778 (8th ed. 2004)). Applying these definitions, the supreme court held that certain annual gifts that a father received from his parents qualified as "income" for child support purposes under section 505(a)(3) because they "represented a valuable benefit to the father that enhanced his wealth and facilitated his ability to support [his minor child]." *Id.*

¶ 31 Relying upon *Rogers*, our appellate court has ruled that income from bonds and other securities may be considered income for child support purposes only if the party "receive[s]" such income, "either actually or constructively." *In re Marriage of Baumgartner*, 384 Ill. App. 3d 39, 56 (2008). If the party has not actually received investment income in a manner that enables him to spend it, his investment assets should be excluded from the calculation of his "net income" for child support purposes, even if he is required to report these assets as "income" for federal tax purposes. *Id.*; see also *Ivanyi v. Granoff*, 171 Ill. App. 3d 411, 421 (1988) (holding that, while the father was required to report interest, dividends and capital gains on his federal income tax, such amounts should not be considered in determining the father's net income for child support purposes because the evidence showed that the father did not receive this income, either actually or constructively). Applying this rule, our appellate court held that the proceeds from the sale of a parent's house could not be considered "income" under section 505(a)(3) because the parent had used the sale proceeds to purchase a new residence and the sale proceeds

were "not actually available to the parent to spend as income." *Baumgartner*, 384 Ill. App. 3d at 56.

¶ 32 In my view, we should reach a similar conclusion in this case. The father's vested RSUs do not generate "income" that is actually or constructively received by the father (*i.e.*, they do not result in a monetary benefit in a form that is available to spend) until they are sold and converted into cash proceeds. Thus, I would find that the trial court did not err in excluding the RSUs from the calculation of the father's income until they are sold. Cases wherein stock options or shares have been treated as income for child support purposes typically involve shares that have been sold or distributed. See, *e.g.*, *In re Marriage of Pratt*, 2014 IL App (1st) 130465 (sale of restricted stock shares); *In re Marriage of Colangelo*, 355 Ill. App. 3d 383 (2005) (vested and distributed stock options).

¶ 33 I acknowledge that some other decisions of our appellate court suggest that certain retirement assets or capital accounts may be deemed "income" under section 505(a)(3) even before they have generated any spendable income that is actually or constructively received by the parent. See, *e.g.*, *Marriage of Pratt*, 2014 IL App (1st) 130465, ¶ 25 (including $5,000 that the father converted from a traditional IRA to a Roth IRA as income even though the father received no funds from the conversion because the conversion was a "taxable event"); *In re Marriage of Winne*, 239 Ill. App. 3d 273, 284-86 (1992) (holding that husband's *pro forma* capital account should be considered in determining his income for child support purposes under section 505(a)(3)). To the extent these cases conflict with the rule announced in *Baumgartner* and *Ivanyi*, I would decline to follow them because I find the latter cases to be better reasoned. Moreover, the court in *Marriage of Pratt* erred by relying on tax consequences in determining whether the IRA conversion at issue qualified as "income" for child support purposes. *Marriage of Pratt*, 2014 IL App (1st) 130465, ¶ 25 In *Rogers*, our supreme court made clear that "the

Internal Revenue Code is designed to achieve different purposes than our state's child support provisions" and "does not govern the determination of what constitutes 'income' under the statutory child support guidelines enacted by the General Assembly." *Rogers*, 213 Ill. 2d at 137; see also *Ivanyi*, 171 Ill. App. 3d at 421.